INDEX

	Page
QUESTION PRESENTED	1
INCLUSION OF APPENDIX	2
STATEMENT	3
ARGUMENT	19
INTRODUCTION AND SUMMARY	19
I. THE RECORD AMPLY SUPPORTS THE IMPOSITION OF A QUALIFICATION UPON THE COMMISSION'S ORDERS BY THE DISTRICT COURT IN THE COURSE OF ENFORCING THOSE ORDERS	21
II. THE DISTRICT COURT WAS FOLLOWING SOUND AND HISTORIC PRACTICE WHEN, IN THE COURSE OF ENFORCNG THE COMMISSION'S ORDERS, IT IMPOSED A LIMITED QUALIFICATION UPON THOSE ORDERS	26
CONCLUSION	36
APPENDIX:	
Part One	1a
Part Two	8a

CITATIONS

CASES:

American Sumatra Tobacco Corp. v. *Securities and Exchange Commission*, 110 F. 2d 117 (D.C. Cir. 1940)	31, 32, 33
Bank of America Nat. Trust & Sav. Assn. v. *Douglas*, 105 F. 2d 100 (D.C. Cir. 1939)	31
Chapman v. *Maren Elwood College*, 225 F. 2d 230 (9th Cir. 1955)	30
Federal Communications Commission v. *Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957)	30
Federal Trade Commission v. *Bowman*, 149 F. Supp. 624 (N.D. Ill. 1957), *aff'd*, 248 F. 2d 456 (7th Cir. 1957)	30
Federal Trade Commission v. *Menzies*, 145 F. Supp. 164 (D. Md. 1956), *aff'd*, 242 F. 2d 81 (4th Cir. 1957), *cert. denied*, 353 U.S. 957 (1957)	30

Page

Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396 (1958) 35
Ford Motor Co. v. *National Labor Relations Board*, 305 U.S. 364 (1939) 30
Graber Manufacturing Co. v. *Dixon*, 223 F. Supp. 1020 (D.C.D.C. 1963) 30
Greeson v. *Imperial Irr. Dist.*, 59 F. 2d 529 (9th Cir. 1932) 3
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 26
In the Matter of Mead Corporation (File No. 571 0656), 13 Pike & Fischer, Admin. Law (2d) 117 (F.T.C. 1963) 19
National Labor Relations Board v. *American Nat. Ins. Co.*, 343 U.S. 395 (1952) 35
National Labor Relations Board v. *Anchor Rome Mills*, 197 F. 2d 447 (5th Cir. 1952) 31
National Labor Relations Board v. *Central Mercedita, Inc.*, 273 F. 2d 370 (1st Cir. 1959) 29
National Labor Relations Board v. *Eanet*, 179 F. 2d 15 (D.C. Cir. 1949) 28
National Labor Relations Board v. *Kingston Cake Co.*, 206 F. 2d 604 (3rd Cir. 1953) 28
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951) 34
Reisman v. *Caplin*, 375 U.S. 440 (1964) 24
Savannah River Electric Co. v. *Federal Power Commission*, 164 F. 2d 408 (4th Cir. 1947) 3
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 (1951) 35
Walling v. *American Rolbal Corporation*, 135 F. 2d 1003 (2nd Cir. 1943) 30
Wanderer v. *Kaplan*, 1962 Trade Cas. Paragraph 70,462 (D.C.D.C. Civil Action No. 2819-62) 19

STATUTES:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*:

Sec. 6(a) 18, 22

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:

Sec. 409(g) 27
Sec. 409(m) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

TAFT B. SCHREIBER and MCA INC.

BRIEF FOR RESPONDENTS TAFT B. SCHREIBER AND MCA INC.

QUESTION PRESENTED

Where the record evinces the intention of the Federal Communications Commission during an investigatory hearing to probe deeply into the activities and operations of respondent MCA, a company which is engaged in a highly competitive industry and one in which trade secrets are of great importance and which company is not subject to the regulatory jurisdiction of the Commission, did the court of appeals err in refusing to reverse the district court order (made after a thorough review of the voluminous record) which required that all further information elicited from re-

spondents be held in confidence until the interrogation of respondents had been completed and the questions and answers could be placed before the district court in the context of the then existing record, at which time the district court would entertain a motion by the Commission to permit the disclosure of the information so elicited.

INCLUSION OF APPENDIX

An Appendix has been included in this brief. In designating the parts of the transcript of testimony before the Commission to be reproduced in the printed record, the Commission omitted parts of the testimony of Mr. Schreiber (and related colloquy between respondents' counsel on the one hand and the Hearing Examiner and the Commission's counsel on the other), which took place on October 21, 1960. When respondents designated the portions of the transcript which the respondents felt should be included in the printed record, the portions so designated by respondents were unfortunately not inserted in the appropriate places in the printed record; therefore, the printed record does not present an uninterrupted flow of the aforementioned testimony as it appears in the transcript. Part One of the Appendix brings together in one place these disjointed parts of the printed record, so that the testimony as set forth in Part One of the Appendix reads exactly as it does in the transcript. Citations to the Appendix utilize the abbreviation "A". Page references to the printed record where the particular testimony appears, as well as to the pages and lines of the transcript are inserted in appropriate places in Part One of the Appendix. Citations to the transcript are abbreviated "Tr.".

Hearings conducted in Washington, D. C., in the same proceeding (i.e., F.C.C. Docket No. 12782) from January 23, 1962, to February 6, 1962, contain material which was called to the attention of the district court [pages 259-261 of the record before the court of appeals], prior to the filing of its order in the instant case.[1]

These hearings are reported in Volume 55 through 62 of the transcript of the testimony (i.e., the Official Report of Proceedings before the Federal Communications Commission in Docket No. 12782), and excerpts from these volumes, which are referred to in other portions of this brief, are included in Part Two of the Appendix.

STATEMENT

Taft B. Schreiber is Vice-President of MCA Inc. and President of Revue Studios, a division of MCA. MCA engages in the production of filmed television shows and leases studio facilities to other producers. MCA (primarily through subsidiaries) also distrib-

[1] Although those hearings took place subsequent to the rendition of the district court's opinion and accordingly the record could not have been placed in evidence, the record was properly considered by the district court in framing its order and may be considered by this Court by an exercise of judicial notice.

In *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408, 410 (4th Cir. 1947), the court stated: "While these matters occurred after the hearing before the Commission, all are matters of public record of which we can take judicial notice, except the condemnation suits, which are admitted in briefs of counsel."

See also, *Greeson* v. *Imperial Irr. Dist.*, 59 F. 2d 529, 531 (9th Cir. 1932).

The Solicitor General, by letter dated January 13, 1965, states that he will enter no objection to our request that the Court take judicial notice of the aforementioned matters.

utes television shows to networks and television stations.

At the time of the Commission's hearings, in 1960, MCA represented, as a talent agent, artists and production companies in various branches of the entertainment industry, but since July 1962, MCA has no longer been engaged in this phase of its business. There is no dispute that there is now, and has been for many years, vigorous competition in each of the fields in which MCA is now and has been active. Trade secrets are of considerable importance to success in MCA's business. MCA owns no television or radio stations and neither it, nor any of its subsidiaries or related companies, is a licensee of, or subject to, regulation by the Federal Communications Commission.

The present controversy between respondents and the Commission arises out of a broad Commission investigation of the television industry. The investigation has been under way for a number of years and under various directives. The present inquiry stems from an Order of the Commission released on February 27, 1959, FCC 59-166 [R. 20], which directed an inquiry into the "policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition" [R. 21]. This Order was supplemented by a Commission Order released on November 10, 1959, FCC 59-1136 [R. 25], which directed that the inquiry be enlarged to embrace "policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing

of programs for radio and television exhibition . . . ." [R. 27].

On October 10, 1960, the Commission, through its Hearing Examiner, convened hearings in Los Angeles On the first morning of the hearings in Los Angeles, the Hearing Examiner announced the so-called "ground rules"—the procedure which he planned to follow during the course of the hearing, as follows [R. 75-76]:

> The full authority of the Commission, within the limits of its order, has been delegated to me as presiding officer, pursuant to Section 5(d) of the Communications Act.
>
> Subject only to review by the Commission in certain instances, for purposes of this proceeding the presiding officer is clothed with the full powers of the Commission itself.
>
> Additionally, I should point out that, notwithstanding some similarity in procedure, this proceeding is not a hearing in the usual sense—that is, it is not judicial in nature—but, as indicated, it is investigatory or fact finding. There are no parties, as such, no litigating parties, and the procedural rules usual to quasi-judicial administrative cases do not apply in their entirety. In other words, the objective of this proceeding is to ascertain facts and make an official record thereof for use by the Commission in performing its functions under the Communications Act.
>
> Those who give testimony appear as witnesses for the Commission. Counsel will request their appearances, or, if necessary, they will be summoned to appear by process issued by the presiding officer.

> While no persons, other than the Commission representatives, may directly participate in the proceeding, any witness will, of course, be permitted to be accompanied by, and to consult with, counsel, if he so desires.

As the hearing progressed, the restrictive nature of the ground rules soon became apparent. One aspect of the ground rules was that counsel for a witness would not be allowed to make any objection. This was shown by several incidents which occurred prior to Mr. Schreiber being called, the first of which arose when Mr. Douglas A. Anello, counsel for a witness sought to state an objection [R. 85-86]:

> Mr. Anello: Mr. Examiner, I don't think—
>
> Chief Hearing Examiner: I am sorry, I can't hear you, sir.
>
> You are at liberty to consult the witness in consultation. I will not hear arguments, nor will I hear objection from counsel.
>
> We have no parties here, as such.
>
> Mr. Bryant: Do you wish to consult with your counsel?
>
> Mr. Morris: May I?
>
> Chief Hearing Examiner: Yes.
>
> Mr. Morris: Thank you.
>
> (The witness consults with counsel.)

A similar incident took place when Commission Counsel, Ashbrook P. Bryant, attempted to elicit a witness' interpretation of an agreement between MCA and a guild representing artists in the entertainment industry [R. 84-85]:

> [Mr. Bryant, continuing:]
>
> Now, as a matter of fact, by this letter, Mr. Kenyon, did the Guild not bind itself apparently in perpetuity not to make any regulation which

would result in preventing MCA from continuing both as a producer of television film and a talent agency representing the members of your organization?

Mr. Taback [Counsel for witness]: Excuse me. At this point I think I would have to object.

Mr. Bryant: Just a moment, sir.

Chief Hearing Examiner: I don't know whether you were here, sir, when we laid down the ground rules of the proceeding?

Mr. Taback: I am sorry, I was not, your Honor.

Chief Hearing Examiner: Counsel will not be heard from directly, there being no parties as such, or litigants in this case.

However, counsel is at liberty to consult with the witness, his client, if the witness so desires.

We will proceed on that basis.

The Witness: On that basis, your Honor, I would like to consult.

Chief Hearing Examiner: Very well.

The Witness: Mr. Bryant, speaking as a laymen, I just don't believe I can answer that. It is obviously a legal question.

Chief Hearing Examiner: Mr. Bryant, I wonder if the witness understands what is meant by the question.

Mr. Bryant: Yes, sir. I don't think it calls for a legal conclusion.

I think it is a simply a matter of your understanding of what this document was intended to so. [sic] And wasn't that precisely it? Wasn't this part of the negotiations and your understanding when this document was prepared and sent to MCA?

Mr. Kenyon: Well, not entirely.

Since the ground rules precluded counsel from making an objection, the only way in which counsel could prevent his client from answering a question was to initiate advice to his client, or wait until his client

asked for advice. However, the Hearing Examiner announced that his ground rules required that the Hearing Examiner's permission be obtained before a witness could consult with counsel [R. 76]:

> Chief Hearing Examiner: Mr. Bryant—when a witness desires to consult with his counsel, he must make that desire known on the record, and the Presiding Officer will rule. Do you understand, Mr. Orr?
>
> The Witness: Yes, sir.
>
> Chief Hearing Examiner: No information shall be volunteered by counsel without permission. I am suggesting no impropriety so far, but I want to make that clear.
>
> The Witness: Do I ask you, Your Honor?
>
> Chief Hearing Examiner: Just announce it on the record, and I will rule.
>
> Proceed.
>
> By Mr. Bryant:
>
> Q. I believe we were at the Roaring Twenties.
>
> A. I would like to check with my counsel.
>
> Chief Hearing Examiner: Any objection, sir?
>
> Mr. Bryant: None, sir.
>
> Chief Hearing Examiner: It may be done.

Having announced the requirement that permission must be obtained before a witness could consult with counsel, the Hearing Examiner arrogated to himself the right to refuse permission [R. 86]:

> Chief Hearing Examiner: May I interrupt you, sir.
>
> Let me ask you whether you are satisfied that, generally speaking, television programs are not having adverse effects on any segments of the population, particularly teenagers?
>
> Mr. Morris [Witness]: I don't consider myself qualified to answer that question, sir.

Chief Hearing Examiner: Have you given it any thought, sir, in connection with your work? I assume you must have.

Mr. Morris: Yes, a very great deal.

Chief Hearing Examiner: You have no view to give the Commission in that behalf?

Mr. Morris: May I consult with counsel?

Chief Hearing Examiner: I see no reason why counsel should be consulted on a thing of this kind. There is no legal question presented. You have reviewed, over a period of 14 months, some 300 plays being produced and readied for consumption by the public.

Now, you must have some views, you must have given it thought considerable time. What do you say here now—without consulting counsel? You don't need the advice of counsel to answer a question like that.

Prior to Mr. Schreiber taking the witness stand, numerous questions were put to witnesses concerning their competitive and other relationships with MCA. For example, a Warner Brothers executive was asked if his company's decision to develop its own talent was based in part upon MCA's activities (the witness' response was negative [R. 77]); an executive of Screen Gems (a subsidiary of Columbia Pictures) was asked whether Screen Gems had been able to obtain stars and other top creative people who were represented by MCA, and whether Screen Gems had paid higher prices for such talent than MCA had paid as a producer (the witness' response was that MCA's being in several activities had not constituted a hindrance to obtaining top talent and that Screen Gems was able to obtain top talent for the same prices paid by MCA) [R. 78-79]; an independent producer was asked if he had found it difficult to obtain talent because of MCA's activities

(the witness' reply was negative) [R. 82-83]. See also R. 79-82.

Such pointed questions were not asked about any other company in the industry, not even about the networks themselves whose practices were ostensibly the main thrust of the inquiry. The guilds and labor organizations which represent persons working in the industry were also questioned closely about their relationship to MCA. Again, concentration on MCA was unique. Also, before Schreiber took the witness stand, counsel for the Commission introduced into evidence as Exhibits number LA 237 and 238 [R. 49 and R. 69, respectively], detailed financial and corporate data concerning MCA, gleaned from the files of the Securities and Exchange Commission and from a financial publication. Respondents are unaware of any other occasion during the hearing when even remotely comparable material pertaining to other companies in the industry was placed in the public record, by the Commission or by independent witnesses.

The attention of the district court was also called [Pages 259-261 of the record before the court of appeals] to hearings conducted by the Commission in Washington, D. C. in the same proceeding (i.e., F.C.C. Docket No. 12782) from January 23, 1962, to February 6, 1962 (which was after the district court filed its memorandum decision but before the filing of its order) in which officials of the major television networks were interrogated in detail with respect to their business dealings with MCA. For example, one of the CBS officials was questioned at length regarding representation by MCA as agent for the Ed Sullivan Show, with obvious (albeit unsuccessful) attempts on the

part of the Commission to have the witness characterize MCA's efforts as being improper [Tr. 8495-8498; A. 9a-11a]. The Board Chairman of National Broadcasting Company, Mr. Robert Sarnoff, was asked whether MCA had been given preferential treatment in the sale of its shows to the networks, as reported in various magazine articles [Tr. 8771-8779; A. 11a-17a]. Mr. Sarnoff categorically denied this. Persistent efforts were made to try to cause the network witnesses, usually by leading questions of the most glaring kind, to testify that MCA used improper tactics or tried to achieve improper benefits [e.g., Tr. 9068-9077; A. 18a-24a]. The network officials were asked about the number of MCA-represented programs and the breakdown of MCA-companies [Tr. 9081-9082; A. 25a]. Financial data regarding MCA's gross income was read into the record [Tr. 9149-9151; A. 26a-27a]. In the light of the entire record, it had become patently clear that the Commission was seeking to delve more deeply into the business activities of MCA than of any other witness.

On the morning of October 21, 1960, in response to a subpoena duces tecum, Mr. Schreiber appeared and brought with him several lists called for by the subpoena. Mr. Schreiber was accompanied by his counsel, Mr. Allen E. Susman. On request of Commission Counsel, Mr. Schreiber readily produced the list specified in Annex A to the subpoena.

Mr. Schreiber then testified that he had the information called for by Annex B and stated "We will be happy to produce it on the basis of its being kept confidential." [A. 1a].

Commission Counsel proceeded to interrogate Mr. Schreiber as to why he believed the material should be

kept confidential. In reply Mr. Schreiber stated [A. 2a]:

> A. Well, this relates to personal relationships, agency relationships with the client. It is confidential in that these are matters really belonging to principals other than ourselves.
>
> And we think that we, in effect, would be not only violating that fiduciary [sic] but at the same time making available information that might be used detrimentally; it would be possibly advantageous to our competitors and people who might welcome that information.
>
> And it has never been generally given.
>
> It has been the policy of our company not to give this information. And it has been a policy for many years.

Commission Counsel was not satisfied with Mr. Schreiber's answer and proceeded to argue with Mr. Schreiber as to the justification and reasons for the confidentiality.

When Mr. Susman asked to be heard as counsel for the witness on the questions raised, the following transpired [A. 4a-6a]:

> Mr. Susman: Just a moment, Mr. Schreiber. I would like to be heard on this.
>
> Chief Hearing Examiner: I am sorry, sir. The ground rules, as you may or may not be aware of—
>
> Mr. Susman: I am aware of what has transpired with counsel in this proceeding, your Honor, but I don't quite agree with the concept of what the ground rules are. But, be that as it may, I think we are getting into an area now where Mr. Mr. Schreiber, who is not a lawyer, is not really in a position to be answering questions of this nature.
>
> Chief Hearing Examiner: I am sorry. I believe I cannot hear you at all. Will you strike counsel's—
>
> Mr. Bryant: Would it help if I—

Chief Hearing Examiner: Strike counsel's statement from the record.

He is at liberty, if he wishes, to consult with his client on the stand at any time, and, likewise, he is a liberty to consult with counsel for the network study office.

But I cannot hear argument of counsel—only statements of the witness, who will reflect the views of counsel whenever he desires to do so.

Mr. Bryant: Well, sir—

Mr. Susman: Just a moment sir. I would like to make a record on this, if your Honor please—

Chief Hearing Examiner: There will be no record made. You are out of order, sir. I have ruled. I will not hear you in this proceeding. We are off the record while you talk.

You may consult with the witness. That is the ruling, right or wrong.

You may have your exception to that, through the witness.

I will not hear you.

Mr. Bryant: May we, sir, have a short recess here to afford Mr. Schreiber an opportunity to consult with Mr. Susman?

Chief Hearing Examiner: Very well. Take ten minutes.

Mr. Bryant: May I say just at the moment, for the record, before we leave, that I, anticipating that a situation of this kind might arise, had a discussion with Mr. Susman before we came in here this morning, and fully acquainted him with the procedures which your Honor had laid down in this proceeding.

Chief Hearing Examiner: Very well, sir.

Mr. Bryant: Ten minutes, sir?

Chief Hearing Examiner: Ten minutes.

(At this point a short recess was taken, after which the hearing was continued.)

Chief Hearing Examiner: Are you ready to proceed, gentlemen?

Mr. Bryant: Yes, sir.

I think there is an open question on the record—if the reporter would read it.

(The question was read.)

Mr. Susman: Mr. Hearing Examiner, will [sic] all deference, your Honor—

Chief Hearing Examiner: I cannot hear you, sir. I will not.

Strike the statement.

Mr. Susman: I think I have a right, sir, to make a record in this matter.

Chief Hearing Examiner: You have a right to make a record through your client. This is not an adjudicatory proceeding. It is investigatory.

I will not hear argument or objections from counsel. The witness is at liberty to refuse for any reason you advise to answer any questions propounded here.

I shall not hear you.

I have not heard any other counsel in this matter.

Mr. Susman: Sir, no lawyer can operate effectively—

Chief Hearing Examiner: Strike the statement from the record.

I warn you, sir, I will have you ejected from these proceedings, if you persist in this contempt.

Let's proceed.

As a result of the ruling by the Chief Examiner, Mr. Schreiber stated that he was deprived of effective and knowledgeable assistance of counsel. He called attention to the fact [A. 7a]:

> Lawyers and witnesses have been told in these hearings that before an attorney may so much as talk to his client, the client must ask the Hearing Examiner's permission to speak with his lawyer. Now, no lawyer can function effectively as a lawyer under these circumstances. I vigorously and completely disagree with the ground rules of this

> kind. In my judgment, such ground rules deprive me and my company of the right to be accompanied, represented and advised by counsel. And I therefore respectfully decline to proceed further as a witness under the duress of such rules.

The Hearing Examiner refused to change his ruling and directed the witness to proceed to provide the material requested. Mr. Schreiber refused to do so for the reasons indicated. He thereupon left the stand.

On November 25, 1960, the Hearing Examiner filed with the Commission a Memorandum Opinion [R. 35], in which he reaffirmed his intention of limiting the role of counsel only to advising Mr. Schreiber "within established procedures." He also found the contention that the material sought by the Commission was confidential "to be without merit."

On December 2, 1960, the Commission Counsel who had participated in the proceedings filed on behalf of the Commission's Broadcast Bureau a "Memorandum in Support of Opinion and Proposed Action and in Opposition to Petition to Review" [Pet. Ex. 15L in the district court]. In that memorandum, the Commission Counsel took the position (advanced for the first time as far as respondents are aware, in the history of this series of hearings) that the Administrative Procedure Act was not applicable to hearings by the Commission of an investigatory nature (pp. 31-34 of Memorandum), that the "Commission Rules of Practice do not delineate the procedures which are required in investigatory proceedings" and that the Commission, pursuant to Title 47 of the Code of Federal Regulations § 1.10, could establish on an ad hoc basis whatever rules, regulations and procedures would, in the Commission's opinion, best serve the interest of the investigation (p. 34 of Memorandum). Thereafter,

the Commission affirmed the Hearing Examiner in all respects and left to the Hearing Examiner the responsibility for determining the extent of confidentiality to be accorded to the material elicited from respondents. In so doing, the Commission said one of the purposes of making the record public was to provide information *to members of the industry.*

Prior to the time set for the reconvened hearing, respondents' attorney moved that the subpoena be quashed and in the same motion, he suggested that, in order to avoid a needless expenditure of time and effort on the part of all concerned, Mr. Schreiber be permitted in the first instance to testify in a closed session and that the information so received be held in confidence until the court should have an opportunity to rule on respondents' contentions; should the Commission prevail, the information could be made public without any further action [R. 102-111]. This alternative was rejected by the Commission. At the resumed hearing, the Hearing Examiner reaffirmed his insistence that the "ground rules" continue to apply. When Mr. Schreiber declined to testify under the duress of such "ground rules", the Hearing Examiner warned Mr. Schreiber of the possibility that the criminal penalties provided in Section 409(m) of the Communications Act of 1934[2] would be invoked. [R. 94-95].

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[2] Section 409(m) reads as follows:

> Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules or charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Upon Mr. Schreiber's refusal to retreat from the position that he and the company which employed him were entitled to the meaningful assistance of their counsel and that the information being sought from him should not be made public, the Commission filed a petition in the United States District Court for the Southern District of California for enforcement of its subpoena and orders. After two hearings the district court made its Findings, Conclusions and Order. Finding XI [R. 125] provides as follows:

> The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission.

The district court's order required, among other things, that [R. 129]:

> [A]ny further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

3. It is Further Ordered that in the course of any further interrogation of respondents:

(a) . . . .

(b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without interference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper.

On appeal a divided panel of the ninth circuit held that Section 6(a) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(a)[3] did not require that respondents be afforded the right to counsel in all particulars as outlined in the district court's order, and modified the order accordingly; however, by the same division, the ninth circuit upheld the district court's order with respect to confidentiality. In ruling on the confidentiality issue, the majority stated [R. 144]:

We hold, therefore, that the Trial Judge did not abuse his discretion, but, on the contrary, estab-

[3] Sec. 6(a) of the Administrative Procedure Act reads in part as follows:

Any person compelled to appear in person before an agency or representative thereof, shall be accorded the right to be accompanied, represented, and advised by counsel or if permitted by the agency, by other qualified representative.

lished a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford appellees protection against the improvident disclosure of possible valuable trade secrets.

The Commission, thereafter, on September 2, 1964, adopted an amendment to its Rules and Regulations [Petition for Writ of Certiorari, pp. 64-65] which guarantees to witnesses before it the right to counsel to which respondents have contended throughout they were entitled under Section 6(a) of the Administrative Procedure Act.[4]

ARGUMENT

Introduction and Summary

On the basis of a record which revealed that the Commission was seeking to probe deeply into the innermost business affairs of MCA, the district court, in the course of enforcing the Commission's order, has required that, preliminarily, testimony and documents obtained from respondents be held in confidence until the court has had an opportunity to evaluate the evidence so elicited and to make a determination as to the

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[4] In *Wanderer* v. *Kaplan*, 1962 Trade Cas. Paragraph 70,462 (D.C.D.C. Civil Action No. 2819-62), the court ruled that the Federal Trade Commission must afford to a witness in an investigatory proceeding the right to counsel as set forth in Judge Yankwich's order in the instant case. Thereafter, the Federal Trade Commission in a proceeding entitled *In the Matter of Mead Corporation* (File No. 571 0656), 13 Pike & Fischer, Admin. Law (2d) 117 (F.T.C. 1963), announced that it was amending its Rule 1.40 (since recodified as Rule 1.36) so that witnesses in investigatory proceedings before it would have the right to counsel which respondents in the instant case sought before the Federal Communications Commission.

need for continuing to maintain such evidence in confidence. Thus, this case does not involve the issue of whether the district court applied an appropriate standard in determining whether information should be publicly disclosed. It does involve the issue of whether the district court has power to require that interim confidentiality be afforded. The Commission's attack on the district court's order proceeds from a level of general abstractions concerning administrative law to an analysis of the impact of the district court's qualification of the Commission's order, all of which ignores what the district court in fact did and results in treating this case as if the district court had required that particular material be held in confidence for all time.

In framing its order as it did, the district court gave temporary recognition to MCA's need for maintaining competitive information in confidence, while at the same time holding for future determination, any claim by the Commission that it had been prejudiced in any way. The district court's actions were consistent with sound historical precedent which recognizes that agencies must be given latitute in formulating policies and procedures, but also recognizes that courts, when called upon to enforce agency process, have an obligation to prevent unnecessary harm from being inflicted upon private parties. Assuming that the district court has the power to modify the Commission's order as it did, in determining whether the facts warranted the exercise of that power, it is appropriate for this Court and the court of appeals to review the record only to the limited extent necessary to determine that the district court has made a conscientious and fair appraisal of the record.

I

THE RECORD AMPLY SUPPORTS THE IMPOSITION OF A QUALIFICATION UPON THE COMMISSION'S ORDERS BY THE DISTRICT COURT IN THE COURSE OF ENFORCING THOSE ORDERS

The facts as viewed from the perspective of the district court demonstrate that the district court acted well within its powers and quite properly in imposing a limited qualification upon the Commission's orders. The Commission's announced intention was to investigate "the policies, practices and activities of MCA, Inc., in connection with the production, casting, packaging, selection and sale of programs for television exhibition . . . ." [R. 16]. As part of the investigation, the questions put by the Commission to witnesses bear out that the Commission's interest in MCA was deep; concentration upon MCA was unique. Detailed corporate and financial data concerning MCA was introduced into the public record. Respondents are unaware of any other occasion during the hearing when even remotely comparable material pertaining to other companies in the industry was placed in the public record by the Commission or by any independent witnesses. During the hearings, it appeared as though MCA, rather than the television industry, was the true subject of investigation. When MCA requested that information furnished by it be held in confidence, its request was refused. When a spokesman for a network stated that he considered certain of his company's studies to be confidential, his claim was respected [Tr. 8961-8963; A. 17a-18a]. Similarly, information concerning network participations in programs was accorded confidential treatment by the Commission [Tr. 8137-8139; A. 8a-9a]. The hearing took place in an atmosphere in which respondents' counsel was threatened with being ejected

for contempt for attempting to afford respondents the rudimentary right to counsel seemingly afforded by Section 6(a) of the Administrative Procedure Act (and recently recognized by the Commission), and in which threats of criminal prosecution were made by the Hearing Examiner when Mr. Schreiber refused to testify.

Thus, the record before the district court, a record to which the Commission in its opening brief has hardly referred, reveals a particularized probing into the business of a company not subject to the regulatory jurisdiction of the Commission; the announced purpose of the investigation was not only to generate information needed by the Commission and Congress but, also, to provide information to "the public, station licensees, [and] the broadcast industry . . . ." [R. 10]. On the basis of this record the district court made its Finding XI, which has not been specifically challenged here by the Commission, as follows [R. 125]:

> The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission.

Faced with the situation outlined above, it is important to recognize what the district court did not do, as well as what it did do. Notwithstanding its Finding XI, the district court did not order that any information elicited from respondents be held in confidence

for an unlimited period of time; rather, its order was that the hearing, insofar as it pertained to respondents, be in private and that the evidence so elicited be maintained in confidence until the Commission should obtain an order from the district court permitting the disclosure. If and when the Commission should move for such an order, the district court would have before it the questions and answers and, therefore, would be able to make a complete appraisal of the factors militating both for and against disclosure.

How has this limited qualification interfered in any substantial way with the Commission's proceedings? The Commission argues [Br. 29] that public disclosure is especially important in order to enable other interested groups and individuals to "verify, refute, explain, amplify or supplement the record from their own diverse points of view", and in order to assist the Commission in making its annual report to Congress. These considerations would certainly have a bearing and arguably a heavy one, if the district court's order had not been limited so as to enable the Commission to move for an order authorizing disclosure. These considerations may have a proper bearing upon the standard to be applied when the Commission does make such a motion. But these considerations are not pertinent in assessing the validity of the order actually imposed by the distrct court, since, by hypothesis, disclosure is not permanetly curtailed. Indeed, on the very day of the termination of the interrogation of the MCA witnesses, the Commission would be free to move the district court that the evidence so elicited be publicly released.

To approach the matter from a slightly different vantage point, let us suppose that the district court had

not included in its order a requirement of interim confidentiality. Would the Commission have been in any better position than it is now? The district court's order also provides that respondents shall not suffer or incur any penalty should they refuse to answer any question until the district court has ruled in favor of the propriety of the particular question and respondents thereafter refused to answer the same. [R. 129-130]. *Cf. Reisman* v. *Caplin*, 375 U.S. 440 (1964). The Commission does not contend that this portion of the order is improper. Therefore, if the hearing had gone on and respondents had refused to answer a particular question or questions, the Commission would have had the choice of either going to the district court and requiring an answer after each refusal to testify, or of waiting until the end of the interrogation and then seeking an order requiring answers to all contested questions. At that point, respondents would be able to object to particular questions or would be able to seek confidential treatment for their answers. Any delays which are inherent in the procedure actually adopted by the district court are inherent in the approach which the Commission now apparently urges and, indeed, might be more aggravated under the Commission's approach. Until a final determination of the propriety of the particular questions is made, the answers will not be available either for use in the hearings themselves or for transmittal to Congress, regardless of whether the district court's order concerning interim confidentiality is upheld. Delays in the public disclosure of information sought by the Commission can occur, not because of the approach adopted by the district court, which is to settle all questions of confidentiality at one time with a record of the questions and answers before it, but because at this point in time the

questions have not been asked (nor the answers given) and because the statutory approach (as embodied in a portion of the district court's order to which the Commission has not objected) is that witnesses may not be compelled to testify until the court has had an opportunity to rule upon the propriety of particular questions.

The district court's order provides the most expeditious and least burdensome method for resolving any issues of confidentiality which could arise in the course of the resumed hearing. With interim confidentiality assured, it will not be necessary for respondents to refuse to answer questions in order to protect their position that the answers should not be publicly disclosed. Then, if there is a disagreement between the Commission and respondents as to whether the information should be publicly disclosed, the matter would be determined at one time by the district court without the need for any further proceedings. If the district court's modification with respect to interim confidentiality is reversed, then, at the resumed hearing, respondents will be forced to refuse to answer questions which they in good faith believe seek confidential information. A refusal to answer preliminary questions might obviously interfere with the Commission's later line of questioning. Either during the course of the hearing or at the end of the hearing, the Commission would have to resort to court process, again, in order to compel respondents to answer and the court would have to pass upon the issues of confidentiality without the benefit of a complete record of the questions and answers. Then, after the court has passed, as best it can, upon the issues of confidentiality presented to it, the hearing would again have to be resumed in order to obtain the testimony of respondents.

II

THE DISTRICT COURT WAS FOLLOWING SOUND AND HISTORIC PRACTICE WHEN, IN THE COURSE OF ENFORCING THE COMMISSION'S ORDERS, IT IMPOSED A LIMITED QUALIFICATION UPON THOSE ORDERS

We have no quarrel with the general proposition that an administrative agency must be given a degree of latitude in administering the statutory scheme for which it is primarily responsible. But the courts have been given two roles in the administrative process; one is to review the actions of agencies at the instance of persons affected thereby; the other is to participate, not as an intruder, in those situations in which Congress has withheld enforcement power from the agencies. When courts are called upon by an agency to enforce an agency order, weight must of course be given to the initial exercise of discretion by the agency, but the courts must also have a degree of discretion in framing their enforcement orders. These principles were voiced in *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944), in which the OPA sought to obtain an injunction against Hecht's selling products in violation of OPA regulations and requiring Hecht to keep certain records.

The Court was faced with language which literally read seemed to require that the trial court grant an injunction if requested by the Administrator. Nevertheless, the Court held that the trial court had a much greater responsibility in enforcing the provisions of the Act than such a literal reading would suggest:

> A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic

> departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. (321 U.S. at 329).
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> * * * *
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> We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *City of Winter Haven,* 320 U.S. 228, 235, 64 S. Ct. 7, 11. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. (321 U.S. at 329-330).

The language of Section 409(g) of the Communications Act does not even purport to require a district court to issue an order to comply with a Commission subpoena; rather, the Section states that a district court "*may,* in case of contumacy or refusal to obey a subpoena issued to any . . . person, issue an order . . . ." (emphasis added). Thus, Section 409(g) contemplates that a district court will have at least the same degree of flexibility in determining whether to enforce Commission process as did the district courts in enforcing orders of the OPA.

In *National Labor Relations Board* v. *Eanet,* 179 F. 2d 15 (D.C. Cir. 1949) the court of appeals refused to enforce a Labor Board order where the evidence of an unfair labor practice was two years old. The court posed the question of its responsibility as follows:

> The important question in the case concerns the function of the court under the statute which controls us. Does the court have a modicum of judicial discretion in passing upon this petition for an enforcement decree? Or is it required to put the stamp of its authority automatically upon whatever request is made of it? (179 F. 2d at 20).

It answered its own question as follows:

> The Board was not given enforcement power; that power was lodged in the courts as a judicial function. Its exercise is not merely mechanical. The courts cannot, of course, refuse to issue enforcement decrees where the Board has found facts and reached conclusions which indicate that, in accordance with its judgment, enforcement is presently appropriate. But surely enforcement must appear to be presently desirable before the solemn power of the courts is brought to bear upon the dispute.
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> * * *
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> Law enforcement is an art; it is not the mere unthinking application of mathematical absolutes. Moreover, entry of decrees unrelated to present reality is not countenanced by our jurisprudence. (179 F. 2d at 21).

In *National Labor Relations Board* v. *Kingston Cake Co.,* 206 F. 2d 604 (3rd Cir. 1953) the court refused to enforce a Labor Board order requiring reinstatement of certain employees, emphasizing a factor which is present in the instant case, namely, that the non-tech-

nical nature of the particular issue did not call into play the assumed expertise of the agency.

> We are quite aware that administration of the Act was conferred upon the board and not upon judges of the courts of appeals. The Act is administered by a group of men whose constant, day-to-day touch with the problems of labor relations gives them a unique feeling for the appropriate solutions to the novel questions in the field. For this reason, their solutions are weighty when questioned before judges who are, usually, without that comforting familiarity. . . .
>
> We said recently, however, that "We approach the problem presented by the Board's petition for enforcement with the well-settled rule in mind that 'The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity.' " *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 3 Cir., 1952, 199 F. 2d 64, 70. Thus, while the board's discretion in ordering affirmative action is wide and should not lightly be disturbed, it has its limits. Certainly, a court of appeals has some responsibility for the effects of its own decree; this is especially so where it appears that enforcement would entail subversion, rather than effectuation of the legislative purpose. Furthermore, we are convinced that this is not a case in which administrative expertise is of compelling weight. It is not a problem of such great technicality that only experts can untangle it. (206 F. 2d at 611).

Emphasizing the equitable nature of courts' enforcement powers, the court in *National Labor Relations Board* v. *Central Mercedita, Inc.*, 273 F. 2d 370 (1st Cir. 1959) refused to grant summary enforcement of a Labor Board order in an instance in which the Board

urged that the respondent had waived its right to object because of the failure to send objections to the appropriate person within the time specified in the Board's rules. The Court said:

> Our enforcement powers being equitable in their nature, we look to the facts and circumstances of this particular case to see if the relief sought is consistent with the basic principles underlying the exercise of equity jurisdiction which are flexibility rather than rigidity and relief molded to fit the needs of the particular case. (273 F. 2d at 372).

Cf. Ford Motor Co. v. *National Labor Relations Board,* 305 U.S. 364, 373 (1939).

When agencies have sought federal court enforcement of subpoenas and similar process, the equitable principles discussed above have been applied, generally as a matter of course, so as to require the agency to afford confidential treatment to particular material. See *Federal Communications Commission* v. *Cohn,* 154 F. Supp. 899, 913 (S.D.N.Y. 1957); *Federal Trade Commission* v. *Menzies,* 145 F. Supp. 164, 171 (D. Md. 1956), *aff'd without point being in issue,* 242 F. 2d 81 (4th Cir. 1957), *cert. denied,* 353 U.S. 957 (1957); *Federal Trade Commission* v. *Bowman,* 149 F. Supp. 624 (N.D. Ill. 1957) (contention by defendant that "disclosure of confidential business information . . . might prove beneficial to competitors if made public" basis for requiring information to be held in confidence), *aff'd without point being in issue,* 248 F. 2d 456 (7th Cir. 1957); *Graber Manufacturing Co.* v. *Dixon,* 223 F. Supp. 1020, 1023 (D.C. D.C. 1963) (cited at page 28 of the Commission's Brief). See also *Chapman* v. *Maren Elwood College,* 225 F. 2d 230, 231 (9th Cir. 1955); *Walling* v. *American Rolbal Corporation,* 135

F. 2d 1003, 1005 (2nd Cir. 1943); *National Labor Relations Board* v. *Anchor Rome Mills,* 197 F. 2d 447, 449 (5th Cir. 1952). *Cf. Bank of American Nat. Trust & Sav. Assn.* v. *Douglas,* 105 F. 2d 100 (D.C. Cir. 1939).

The Commission misreads *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission,* 110 F. 2d 117 (D.C. Cir. 1940). In that case the company which was subject to the jurisdiction of the SEC requested the SEC to maintain in confidence certain financial information which had been filed by the company as part of its registration statement. The SEC pursuant to published rules and regulations held a hearing on this question, in the meantime keeping the information confidential. After the hearing, the SEC concluded that the information should be made public. An appeal was thereupon taken to the court of appeals. That court after reviewing the entire record sustained the SEC's action. There are several very significant distinctions between *American Sumatra* and the instant case.

In the first place, the issue in *American Sumatra* was not one of interim confidentiality as in the present case but rather was whether the material should be accorded confidential treatment for an unlimited period of time. By receiving the information in confidence originally and then not disclosing it until the court of appeals ruled upon the company's contention, the SEC was, for all practical purposes, following the same procedure of interim confidentiality which was adopted by the district court in the instant case.

Secondly, the court's emphasis in *American Sumatra* in refusing confidential treatment was upon the important place disclosure occupied in the statutory

scheme of regulation. Thus, the court said (110 F. 2d at 119):

> "Judged by this statement of policy [referring to Section 2 of the Securities and Exchange Act of 1934], it is clear that the Act contemplates publicity of corporate financial reports to insure the maintenance of fair dealing in the purchase and sale of securities not only for the benefit of the investing public, but as well for the protection of banks in which loans are collateralled by such securities."

The court continued (110 F. 2d at 120):

> "What does appear is that the obvious purpose and intent of the Act is a full and complete disclosure of each registrant's financial condition, including a true statement of its profits and losses from time to time. The general principle underlying this requirement is as apparent to the layman as to the expert, and grows out of scandals resulting from past frequent manipulation of securities by the "insider", to the detriment of the investor. To correct these abuses, no one doubts, was in the public interest, and while nothing unfair or improper is imputed to petitioner, the question whether its case presents such positive equities as entitles it to be excepted from the general rule is, after all, the only question for decision."

The court noted (110 F. 2d at 121) that the SEC had not justified its position on the grounds of a general rule or general policy. This analysis is further substantiated by an examination of the brief filed by the SEC with the court of appeals in the *American Sumatra* case. The argument made by the SEC was not that disclosure is important in order to enable it, the SEC, to make reports or to conduct an investigation (factors which would, of course, be present in any agency investigatory proceeding); rather, the SEC

urged that the very essence of the statutory scheme which it was administering required that the information sought from the company be made available to the public so that the public could make investment decisions based on such information, so that banks and institutional lenders could carefully evaluate securities which they were holding as collateral and so that stockholders and creditors of listed companies could learn whether or not such companies were being fairly managed. The SEC's brief drew heavily upon congressional history to emphasize its point that disclosure was an end in itself under the statutory scheme. Excerpts were included in its brief from the following reports: H.R. Rep. No. 1383, 73d Cong., 2d Sess., p. 11; S. Rep. No. 1455, 73d Cong., 2d Sess., p. 74; S. Rep. No. 792, 73d Cong., 2d Sess., p. 5.

At page 10 of the SEC's brief, it summarized its position as follows:

> "[T]he provisions requiring full and honest disclosure of corporate financial affairs as a prerequisite to the enjoyment of an exchange market, exemplify in a very real sense the basic philosophy of the Act. They demonstrate the conviction of the Congress that a free, fair, and honest market in securities cannot exist without full, fair, and honest publicity of all the facts material to the value of the securities traded."

Surely it is apparent, notwithstanding, the bold assertion in the Commission's brief to the contrary [Br. 24], that the Communications Act is not similarly based upon a "disclosure concept" and the public disclosure of the details learned in an investigation is not a vital and basic ingredient in the statutory scheme.

A further distinction between the instant case and *American Sumatra* is the fact that MCA is not subject to the regulatory jurisdiction of the Commission. The

Commission's position seems to be that since what is involved is an investigation, the only issue is whether or not the Commission has carte blanch to elicit any information its requests in the possession of respondents [Br. 24-25]. The Commission further urges that it would produce an "anomalous result" if the Commission could render procedural rulings against witnesses subject to its regulation more freely than against witnesses who are not covered by its regulatory powers. We submit that the Commission's analysis is wrong; in reaching its determination concerning the enforcement of an agency order, one of the factors which a court should be able to take into account is whether the particular company is engaged in an activity which is subject to the agency's regulation. A company voluntarily engaging in a business which is subject to an agency's jurisdiction must obviously expect a lesser degree of protection against intrusion into its activities than does a company not engaging in such a business.

In view of the minimal effect of the district court order upon the instant investigatory proceeding, we think it clear that the district court was acting well within its power when it modified the Commission's order to provide for interim confidentiality. Congress has committed to district courts the initial responsibility to enforce orders of the Commission. Since the district court's decision was reached after a conscientious review of the entire record thus far made, and since its evaluation of the record is clearly reasonable, neither this Court nor the court of appeals should attempt to make a minute re-evaluation of the entire record. As was stated in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951):

> Were we called upon to pass on the Board's conclusions in the first instance or to make an inde-

> pendent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. (340 U.S. at 502).
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> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where concluclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193. (340 U.S. at 503).

See also *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491 (1951); *National Labor Relations Board* v. *American Nat. Ins. Co.,* 343 U.S. 395, 410 (1952) (where the same rule was applied to a mixed question of law and fact, namely, the court of appeals' refusal to enforce a Labor Board order because of its disagreement with the Labor Board as to whether an employer had bargained in "good faith"); *Cf. Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400-401 (1958).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals, to the extent that the Commission has sought review thereof, should be upheld so that the district court's order, with respect to interim confidentiality, will therefore be sustained.[5]

Respectfully submitted,

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[5] We think it clear from the record that the district court's modification of the Commission's order was proper. However, should the Court determine that the district court employed an incorrect standard in reaching its determination, we join in the suggestion of the Commission [Br. 31, n. 16] that the case be remanded to the district court for judicial review under the appropriate standard.

Although we do not believe that the case is now ripe for a determination as to the proper standard to be employed by the district court in determining whether particular evidence which may hereafter be elicited at the hearing should be subject to public disclosure, the Court, in the exercise of its supervisory jurisdiction over lower federal courts, may deem it appropriate to suggest the proper standard.